NO. 314

IN THE

Supreme Court of the United States

October Term, 1944

PORTLAND GENERAL ELECTRIC COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Because, as hereinafter pointed out, this petition was not filed in time, we believe the Court will have no occasion to consider whether there are any "special or important reasons" for reviewing the case on writ of certiorari. However, since motion to dismiss the petition does not lie, we direct our answer and supporting brief not

only to the jurisdictional issue, but also to the "reason relied on for the issuance of the writ," together with reasons why the writ should not issue.

It will be noted that the District Court sustained exceptions to the second amended libel and thereupon dismissed the same, the order of dismissal being affirmed on appeal (Tr. of Rec., pp. 2-9, 29). On the record the allegations of the second amended libel must, of course, be taken as true (Tr. of Rec., pp. 2-4). It is significant that the allegations held insufficient appear in the *second* amended libel. The original libel, before time to answer had expired, was displaced by a first amended libel. Exceptions filed against the substituted pleading were sustained (Tr. of Rec., p. 9). Proctor for petitioner had opportunity, through use of pretrial proceedings, to elaborate upon the facts, but elected not to do so. Instead he filed a second amended libel and stood upon the same after exceptions thereto had been sustained. Thus, although by two amendments successively made, counsel endeavored to strengthen his position, yet upon all facts most favorable to libelant, both the district and appellate courts ruled that no cause within the admiralty and maritime jurisdiction of the Court was set forth.

It will further be noted from the allegations of the second amended libel that the basis of the claim against the United States of America is the Suits in Admiralty Act, 46 U.S.C.A., Sec. 742, and the Public Vessels Act, 46 U.S.C.A., Sec. 781. However, neither act permits proceedings against the United States of America in

cases not cognizable in admiralty against private vessels or their owners. *State of Maine vs. United States* (*The Ilex*), 134 F. (2d) 574, C.C.A. 1st Circuit. This principle was conceded by proctor for petitioner both in the district and appellate courts and no suggestion otherwise is made in the petition herein.

Accordingly, the controversy on its merits involves only one question: Does admiralty jurisdiction attach where a vessel in dragging her anchor breaks an electric power transmission cable which is attached to connections on each side of a navigable river and extends from shore to shore along the bed of the river?

The "reason relied on for the issuance of the writ" is that this is an important point of admiralty jurisdiction on which the courts in the different circuits are at variance and it is in the public interest that it be settled. Respondent denies the validity of these reasons and each of them and on its own part asserts that the petition for writ of certiorari should be denied for the following reasons:

1. This Court has no jurisdiction to entertain the petition because the application was not made within three months after entry of the decree in the Circuit Court of Appeals for the Ninth Circuit (28 U. S. C. A., Sec. 350).

2. Certiorari was denied by this Court in a previous case where the identical issue as to admiralty jurisdiction was involved. *Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co.*, 17 F. (2d) 239 (1927) C. C. A. 9th Circuit; cert. den. 274 U. S. 745, 71 L. ed. 1325.

3. No Circuit Court of Appeals has ever rendered a decision in conflict with that in the instant case; on the contrary, the only appellate court decisions involving the same issue are in accord with the decision herein (*Nippon etc. vs. Great Western Co., supra, Westfell Larson and Co. vs. Allman Hubble Tug Boat Co.* 73 F. (2d) 200 C. C. A. 9th Circuit, *United States of America vs. Tug John R. Williams,* C. C. A. 2nd Circuit, decided July 25, 1944, not yet reported. See also *Bell Telephone Company of Pennsylvania vs. United States of America* (The S. S. Cavalcade), C. C. A. 2nd Circuit, decided July 25, 1944, not yet reported.)

4. There is no public interest justifying issuance of writ of certiorari herein.

5. The principles of law governing the issue here involved have been settled by prior decisions of the Supreme Court.

ARGUMENT

I. PETITION NOT FILED IN TIME.

This case came on for hearing before the Circuit Court of Appeals for the Ninth Circuit on April 24, 1944. The Court, after hearing oral argument by proctor for appellant (petitioner herein), declined to hear argument on behalf of respondent and from the Bench ordered that the decree of the District Court be affirmed. (See "Excerpt from Proceedings," Tr. of Rec., p. 20.) On the

same date, that is April 24, 1944, final decree of the Circuit Court of Appeals, affirming the decree of the District Court, was filed and entered with the Clerk of the Appellate Court (Tr. of Rec., p. 21). Not until August 2, 1944, over three months after the decree of which petitioner complains was entered, was respondent served with notice of filing of the petition. We understand that the petition was docketed in the United States Supreme Court on the same date.

28 U. S. C. A., Sec. 350, provides:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

It is apparent that the application for writ of certiorari herein was not made within the three months' time allowed by the above quoted statute, and that the finality of the Circuit Court of Appeals decision for purposes of review has been established; hence the petition for certiorari should be dismissed.

Proctor for petitioner, however, has informally urged that the computation of time should commence not on April 24, 1944, but rather on May 8, 1944, the date on which a Per Curiam Opinion was filed in the Circuit Court of Appeals (Tr. of Rec., pp. 22, 23). Reliance is placed upon the statement of Mr. Paul P. O'Brien (Clerk of the Circuit Court of Appeals for the Ninth Circuit),

who, in his "Manual of Federal Appellate Procedure," 3rd Ed., page 283, says:

> "A judgment is entered in the Circuit Court of Appeals (C. C. A. 9), on the day the opinion is rendered and filed, and unless a petition for rehearing is filed, the time for application for writ of certiorari begins to run from the date the opinion is filed."

(No petition for rehearing was filed in the instant case.) Of course if May 8, 1944, should be considered as the starting point of the three months' period, the application herein was made in time.

It is apparent, however, that Mr. O'Brien was discussing the usual practice of the Circuit Court of Appeals for the Ninth Circuit. His statement that the time for application for writ of certiorari begins to run from the date the opinion is filed applies in ninety-nine out of one hundred cases decided in that Court. The instant case happens to be the one hundredth case, to which the statement has no application. Ordinarily the written opinion is a condition precedent to entry of the decree or judgment because the latter is necessarily based thereon. In the instant case the Per Curiam Opinion filed May 8, 1944, was obviously not a condition precedent to and was, indeed, wholly unnecessary as a basis for entry of the decree on April 24, 1944. As above pointed out, the decree was based upon the decision of the Court announced from the Bench and recorded in the Court's proceedings of the same date. To contend that the opinion of May 8th governs rather than the decree of April 24th is tantamount

to arguing that if the opinion of May 8th were never prepared or filed, the time to make application for a writ of certiorari would never commence to run!

The principle controlling in the instant case was announced in *Puget Sound Power and Light Co. vs. King County,* 264 U. S. 22, 68 L. ed. 541. (See, also, Annotation in 87 L. ed. 261.) In the Puget Sound case the Second Department of the Washington Supreme Court filed its opinion October 15, 1921. The case was re-argued before the Court en banc which, in a Per Curiam Opinion filed June 12, 1922, approved the decision of the Second Department and affirmed the judgment of the Superior Court. On July 10, 1922, there was entered in the minutes of the Washington Supreme Court an order affirming the judgment of the Superior Court. On September 22, 1922, application was made for writ of error to the United States Supreme Court. It will be noted that the application was made within three months after the judgment of the Washington Supreme Court, but more than three months after the Per Curiam Opinion was filed.

Under the applicable Washington statute, where hearing en banc was ordered and had, as in the *Puget Sound* case, the Per Curiam Decision became final when filed although there was also in the statute specific provision that a judgment should issue thereon. Upon motion to dismiss the writ of error, the United States Supreme Court said:

> "It is apparent that, however final the decision may be, it is not the judgment. It is said that the latter

> is a mere formal, ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the state, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916 * * * fixing the time in which writs of error must be applied for and allowed."

The motion to dismiss the writ granted the Puget Sound Company was denied. In other words, Congress in enacting 28 U. S. C. A., Sec. 350, meant exactly what it said: the application for the writ must be made within three months after entry of *judgment* or *decree,* not within three months after the rendering or filing of the opinion. In general, see *Rosenberg vs. Heffron,* 131 F. (2d) 80, 82, C. C. A., 9th Circuit; Cyclopedia of Federal Procedure, 2d Ed., Vol. 10, Sec. 5112.

Where no application for certiorari is filed within three months after entry of the decree, the Supreme Court loses jurisdiction to consider the merits of the decree. *Toledo Scale Co. vs. Computing Scale Co.,* 261 U. S. 399, 67 L. ed. 719.

II. CERTIORARI PREVIOUSLY DENIED.

In 1927 the Circuit Court of Appeals for the Ninth Circuit decided the *Nippon* case above cited and referred to in petitioner's brief, pages 11-13. In that case the Power Company furnished electric power for industrial uses in San Francisco. Part of the electric energy was gener-

ated in Alameda County and conducted from the County shore across to San Francisco by way of two cables which rested on the bottom of the bay. A steamship, dragging her anchor, damaged these cables. The Power Company brought a libel in personam against the owner of the ship in the District Court and was allowed to recover. The Ninth Circuit Court of Appeals reversed the District Court, holding that admiralty had no jurisdiction in the premises.

The Power Company then filed a petition for certiorari to the United States Supreme Court, the proceeding being docketed under No. 1010. Reasons assigned for granting the petition included the following:

1. The Ninth Circuit Court of Appeals had decided an important question of law in a way probably untenable and in conflict with the weight of authority.

2. The Court had decided an important question of Federal jurisdiction in a way probably in conflict with applicable decisions of the United States Supreme Court and which had not been, but should be, settled by the Supreme Court.

3. The Court had so far departed from the accepted and usual course of jurisdictional proceedings as to call for an exercise of the power of supervision of the Supreme Court.

(See petition for writ of certiorari in *Nippon* case, page 2.)

The case was ably and exhaustively briefed by proctors for both parties. On May 2, 1927, certiorari was denied, no formal opinion being rendered.

At the time of the *Nippon* decision three of the cases relied upon by proctor for petitioner herein (see p. 3, petition for writ of certiorari) had been decided, namely, *Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc.*, 221 Fed. 105, D. C., E. D., N. Y. (1915); *United States vs. North German Lloyd*, 239 Fed. 587, D. C., S. D., N. Y. (1917), and *The Toledo*, 242 Fed. 168, D. C., D. N. J. (1917).

All of the cases just cited were considered by the Circuit Court of Appeals for the Ninth Circuit in the *Nippon* case. The Court in its decision noted that all three cases involved telegraph cables which may have had some use in navigation "by the transmission of messages therethrough to direct the course and movement of vessels." No such use could follow as an incident to the purpose of a power cable. More important, however, the Circuit Court of Appeals pointed out that a power cable is analogous to a revolving shaft in a waterproof casing which might communicate physical impulses from bank to bank along the bottom of the strait. Such shaft, the Court held, would have no marine character. We quote from the *Nippon* case:

> "If the decisions in the telegraph cable cases are applicable, the lines under water become detached from the land structures and take character as a segment distinct from the rest of the physical system—a legal amphibian, truly. It would seem that such a

> segment cannot be thus separately defined, without support from the very criterion—that every injury committed by a ship is compensable in admiralty—which the Supreme Court of the United States has said is no part of American maritime law."

Assuming that the decisions in the three telegraph cable cases cited were in conflict with the *Nippon* decision which involved a power cable, that conflict was not between Circuit Courts of Appeal, as contemplated by Rule 38-5 (b) of this Court, but rather was between the Circuit Court of Appeals for the Ninth Circuit and certain District Courts in the Second and Third Circuits. As will hereafter be pointed out, the conflict with the District Courts in the Second Circuit has now been eliminated by the decision of the Circuit Court of Appeals for that Circuit in the case of the *Tug Williams*. Moreover, the Circuit Court of Appeals for the Ninth Circuit in 1934 in *Westfall Larson and Co. vs. Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200, re-affirmed its decision in the *Nippon* case and re-affirmed both holdings in its decision in the instant case. Accordingly, if it was proper for the Supreme Court of the United States to deny certiorari in the *Nippon* case, a fortiori the Court should do so in the instant case.

III. ACCORD, NOT CONFLICT, EXISTS BETWEEN CIRCUIT COURTS OF APPEALS.

The case of the *Tug Williams* was decided July 25, 1944, eight days before notice of filing the petition for

certiorari in the instant case was served. The appeal was from the Southern District of New York in the case discussed at page 14 of petitioner's brief, entitled *United States vs. Tug Williams,* 1941 A. M. C. 1588. The decision reverses the holding of the District Court which had sustained admiralty jurisdiction for injury to a telephone cable in New York Harbor and dismisses the libel as against the Tug Williams and her stipulators. At the present writing the decision remains unreported, hence we have attached as Appendix "A" to this brief a copy of all pertinent portions of the decision. It is to be noted that the Appellate Court in its decision cites the *Nippon, Westfall Larson* and instant cases, calling attention to the fact that the Circuit Court of Appeals for the Ninth Circuit "is the only Court of Appeals that has considered a question almost exactly resembling the one before us." The Court, however, overlooks a prior dictum of its own in *The No. 6,* 241 Fed. 69, 71 (1917), C. C. A. 2nd Circuit, where it observed that damage to a submarine gas pipe was not a maritime tort.

The effect of the decision by the Circuit Court of Appeals for the Second Circuit is, of course, that all District Court decisions in the same Circuit, which are not in accord with the Appellate Court's holding, are no longer the law in that Circuit. These decisions include not only the *Sanford Ross* and *North German Lloyd* cases above cited, but also *United States vs. The Majestic,* 1932 A. M. C. 1079, D. C., S. D., N. Y., and *New York Telephone Co. vs. Cities Service Transportation Co.,* 23 F. Supp. 426, D. C., E. D., N. Y. (1938) (both of which are cited

in petitioner's brief, page 13. The decision in *The Russell No. 6,* 42 F. Supp. 904, D. C., E. D., N. Y. (1941) (not discussed in petitioner's brief), holding that admiralty jurisdiction did not attach in a case involving damage to oil pipe lines running under water across the Arthur Kills, is in effect approved.

In *Bell Telephone Company vs. United States of America (The SS Cavalcade),* 1943 A. M. C. 220, D. C., E. D., N. Y. (petitioner's brief, page 14) a libel in admiralty charged the SS Cavalcade, owned by the United States of America, with negligently causing her anchor to come in contact with submarine telephone cables. Exceptions to the libel were filed on the ground that the cause was not within the admiralty jurisdiction, which exceptions were overruled. The Government then filed a petition in the United States Supreme Court, asking that a writ of prohibition issue enjoining the trial court for lack of jurisdiction from proceeding further with the cause.

The Circuit Court of Appeals for the Second Circuit, on the same date that it decided the case of the *Tug Williams,* denied the petition. The Court stated that in view of the allegations of the libel, it was "hard to see how jurisdiction in admiralty can exist if the decision in the *United States vs. Tug Williams* is correct." Despite, however, the likelihood that libelants would fail in the District Court, the Appellate Court concluded that the case should be left for decision in the lower court and "for review in due course on appeal and not disposed of on applications for writs of prohibition and mandamus." Since

the *Cavalcade* is likewise unreported as of the present writing, we attach hereto as Appendix "B" all pertinent portions of the Appellate Court's decision therein.

There remains, in the Third Circuit, *The Toledo*, 242 Fed. 168, D.C., D. N. J. (1917), the only case not yet directly overruled, which upholds admiralty jurisdiction where a vessel injures a submarine telegraph cable. But *The Toledo* ruling was disapproved in the *Nippon* case; this Court refused certiorari when it was urged that *The Toledo* decision, among others, was in conflict with the *Nippon* decision; *The Toledo* was noted, but disregarded, by the New York District Court in *The Russell No. 6; The Toledo* is in conflict with the *Mont Agel*, 1924 A. M. C. 401, D. C., N. D., La., *Postal Telegraph Cable Co. vs. SS "Cananova"*, 1942 A.M.C. 281, D.C., S.D., Fla. (both in the Fifth Circuit), and *The Trinidad*, 1932 A. M. C. 1144, D. C., W. D., Wash., (Ninth Circuit), all of which denied admiralty jurisdiction; and finally, it was disapproved by the Second Circuit Court of Appeals in the *Tug Williams*. Considering the trend of the decisions elsewhere, it is highly unlikely that if the New Jersey Court were today passing on the same issue, it would do other than follow the rule of the Second and Ninth Circuit Courts of Appeals.

IV. NO PUBLIC INTEREST JUSTIFIES ISSUANCE OF WRIT OF CERTIORARI.

The concluding portion of petitioner's brief (pp. 15-18) is devoted to the contention that it is in the public interest

to have this question of admiralty jurisdiction settled. The principal reason advanced is "the conflict of decisions in the different circuits." However, as already pointed out, that conflict was practically eliminated by the Circuit Court of Appeals for the Second Circuit a few days before the notice herein was filed.

It is urged that the use of submarine cables throughout the country is increasing, with resulting frequency of cable damage from ship's anchors. The implication seems to be that unless admiralty jurisdiction is extended, the injured cable owner is left without remedy. But where the offending vessel is privately owned, the injured claimant has his common law right of action against the owner. In Oregon the claimant may also in the State Court seize the vessel under procedure substantially identical with that in admiralty. (Secs. 67-801 (4), 67-803-817, O. C. L. A.) In any other state bordering on navigable waters where a similar boat lien law may not exist, the legislature thereof is certainly competent to adopt a similar statute.

In the instant case the United States of America, and not a private individual or corporation, is the defendant. Speaking generally upon this subject, proctor for petitioner asserts that with the huge fleet of government vessels now operating as merchant ships, cable damage is ordinarily done by action of a government ship, and unless the cable owner can sue the United States under the Suits in Admiralty Act, he is without redress.

This argument is more properly addressed to Congress than to the Court. The United States of America can

never be sued without its consent. By the Suits in Admiralty Act the Government, however, consented to be sued in admiralty in any case where a private owner or his vessel could be sued, provided however, that neither vessels of the United States nor cargo owned or possessed by the United States should be subject to arrest or seizure. The holdings in the *Tug Williams* and instant cases are simply to the effect that admiralty jurisdiction is not to be extended irrespective of the identity of the respondent. If there are practical reasons why government immunity should be lifted where a government ship injures a submarine cable, Congress is the body to do the lifting.

Reference is made by petitioner's proctor to the "hairline distinction" suggested between a telephone or telegraph cable and a power cable. Insofar as the instant case is concerned, this distinction involves only a moot question. Neither in the case of the *Tug Williams*, nor in the instant case was any contention made that the cables were aids to navigation—rather they were obstructions to navigation. Cf. *The Troy*, 208 U.S. 321, 322, 52 L. ed. 512.

We next quote from page 16 of petitioner's brief as follows:

> "The plain and indisputable fact * * * is that the cable is not a *structure* on land. It lies loosely on the bed of the river. It has, purposely, so much slack that it can be lifted to the surface and laid across barges for examination or repair. At the time it is damaged, it is not even on the bottom but lifted up and dragged therefrom by the ship's anchor, so it is actually in the water * * *. The cable is not fastened to the land as a pile driven into the river bed. It

> merely has electrical connections on the bank connecting it with the land cable * * *. It is * * * 'an adjunct, rather than a prolongation or extension of, a structure on land'."

We believe it can fairly be inferred from the opinion in each case where admiralty jurisdiction was denied that the cable in question lay loosely on the bed of the river. It was necessary in the first instance that there be sufficient slack in the cables to lay them in place. That same slack would no doubt make it possible to lift any one of these cables to the surface of the water and lay it across a barge for repairs.

This aspect of the question was considered in *Morrow S. S. Co. vs. Superior Water, Light and Power Co.*, 31 F. (2d) 486 (1928), D. C., W. D., Wis. In that case an electric cable, which normally lay on the bed of the bay, was, when damaged by collision with a ship, afloat on a line of barrels or buoys on navigable water for repair purposes. Contention was made that under the doctrine of the *Nippon* case admiralty had no jurisdiction because the cable was an instrumentality of land commerce. The Court held that at the time of the accident "this cable was in fact being navigated in a limited sense upon navigable waters and temporarily, at least, was a part of navigation. In this respect the case is clearly distinguishable from the Nippon case." The implication is that if the cable had been damaged while lying in its normal position on the bed of the bay, the rule of the *Nippon* case would have been applied. That the power cable in the instant case was capable of being lifted from the bed of the river for

repair purposes is immaterial. At the time it was fouled by the ship's anchor, it was in its normal position on the bed of the river. If, as proctor for petitioner argues, the cable at the time it was damaged had already been lifted up so that it "was actually in the water," nevertheless, the damage was the proximate result of the anchor coming in contact with the cable while the same was in its normal position, i.e., resting on the bed of the channel.

In *The Russell No. 6,* supra, at page 908, the Court said:

> "Whether the pipe lines here in question were or were not affixed to the bottom is of no moment. The pipe lines in question were affixed onto the plant on both sides of the Kill, and formed part of the libellant's plant as a whole, which could not have been operated without such pipe lines, unless some other means of sending the oil from Bayonne to Bay Way was provided."

V. GOVERNING PRINCIPLES OF LAW HERETOFORE SETTLED BY THE SUPREME COURT.

Except for denial of the petition for certiorari in the *Nippon* case we have found no decision of this Court touching upon the issue of admiralty jurisdiction where a ship's anchor damages a submarine cable. The applicable principle of law, however, has been announced by the Supreme Court in not one, but several decisions.

The relevant cases are cited and discussed in the *Nippon* and *Tug Williams* opinions. We shall not unnecessarily

repeat the discussion of those cases by the Second and Ninth Courts of Appeals. We, however, select and comment upon a few of the cases in order to indicate the principle which underlies them.

In *The Plymouth*, 3 Wall 20, 18 L. ed. 125 (1866), recovery in admiralty was denied where a wharf was damaged by fire which started on board a ship moored to the wharf. The Court ruled that both the origin and consummation of the wrong had to be completed within the navigable waters. The damaged wharf, however, was a land structure which, although used in connection with ship commerce, provided no maritime locus to support a tort libel.

In *The Blackheath*, 195 U. S. 361, 49 L. ed. 236 (1904), this Court held that damage done by a vessel to a beacon erected on a point of land, but used for the purposes of warning shipping, was cognizable in admiralty. The Court said:

> "* * * we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, — a beacon emerging from the water, — injured by the motion of the vessel, by a continuous act, beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering *The Plymouth* or any other authority binding on this court."

The ruling in *The Blackheath* was also applied in *The Raithmoor*, 241 U. S. 166, 60 L. ed. 937, where the dam-

age caused by the ship was to an incompleted beacon. We quote from the decision as follows:

> "* * * Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 320, 52 L. ed. 508, 512, * * *. In that case it was decided that the admiralty did not have jurisdiction of a claim for damages caused by a vessel adrift, through its alleged fault, to the center pier of a bridge spanning a navigable river and to a shore abutment and dock. Referring to The Blackheath, and drawing the distinction we have noted, the court said: 'The damage' (that is, in The Blackheath) 'was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function. . . . But the bridges, shore docks, protection piling, piers, etc.' (of the Cleveland Terminal Company) 'pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore, and aids to commerce on land as such'."
>
> * * * *
>
> "The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation, and while it had not yet been finished and accepted, it was being erected under the constant supervision of a government inspector acting under the authority of the United States in the improvement and protection of navigation."
>
> * * * *
>
> "This is not the case of a structure which at any time was identified with the shore, but, from the

> beginning of construction, locality and design gave it a distinctively maritime relation. When completed and in use, its injury by a colliding ship would interfere, or tend to interfere, with its service to navigation; and, while still incomplete, such an injury would tend to postpone that service. We know of no substantial reason why the jurisdiction of the admiralty should be sustained in the one case and denied in the other."

The case, however, which the Circuit Court of Appeals for the Second Circuit in the *Tug Williams,* thought to be "most nearly in point", is *The Poughkeepsie,* 162 Fed. 494 (1908), affirmed in Per Curiam opinion in 212 U. S. 558, 53 L. ed. 651. In that case certain borings had been made in the bottom of the Hudson River for the purpose of locating an aquaduct under the river. The borings consisted of iron pipes surrounded by a platform on the surface of the river. The steamer collided with the platform and pipes causing damage thereto. No connection existed between the borings and any structure on land, the borings being affixed only to the bed of the river. Admiralty jurisdiction was denied, the District Judge, among other things, saying:

> "I am unable to see how without the authority of The Blackheath the jurisdiction here could be sustained. The project which the libellant was engaged in is not even suggestive of maritime affairs. It was supplying water to a city and the mere fact of the means being carried under the bed of a river, with extensions through the river to the surface, did not create any maritime right, nor was it in any sense an aid to navigation, which was the distinguishing feature of The Blackheath."

The principles underlying the foregoing decisions may be summarized as follows:

1. Where the injured object is a shore structure or an extension of the shore and is concerned with commerce on land, admiralty jurisdiction against the offending vessel will not be sustained.

2. Where, however, the injured object, although affixed to the earth, is surrounded by navigable water, is solely an aid to navigation and maritime in nature, admiralty jurisdiction against the offending vessel will be sustained.

It is apparent that the instant case falls within the first of the above mentioned categories. Portland General Electric Company's cable lay on the bed of the river. It was attached to connections on each bank of the river. Its purpose was to transmit electrical energy from one side of the river to the other to meet the needs of petitioner's customers. No claim whatever is made that the cable was an aid to navigation or maritime in nature—indeed, from the standpoint of navigation, it would have been far better if the cable had never been laid. Its sole function was in aid of land commerce.

Undoubtedly considerations of economy, practicability, or convenience induced petitioner to place the cable on the bed of the river. The transmission line could have been an aerial cable or one attached to a bridge (if there had been a bridge at this location). Under such circumstances even the New York District Court in *Postal Telegraph Cable Co. vs. Ross,* supra, would have conceded that ad-

miralty had no jurisdiction. 221 Fed. 105, 108. The actual position of the cable on the bottom of the stream did not alter its nature or function.

If in *The Poughkeepsie*, supra, where the boring equipment was completely surrounded by navigable waters, but had no attachment with the shore, admiralty jurisdiction was denied, a fortiori in the instant case where the cable lay under the water and was physically connected with both shores, admiralty jurisdiction was properly denied.

CONCLUSION

There is neither statute nor judicial decision in the United States authorizing an Admiralty Court to award damages for injuries by vessels afloat to land structures or their extensions which are not in aid of navigation. Effort has been made to obtain Federal legislation extending admiralty jurisdiction in cases where vessels inflict damage on land structures, but such effort has been without success. Robinson, Admiralty, pp. 52, 53. Assuredly this court will not be persuaded by the prayer of petitioner to legislate judicially in a respect as to which Congress has declined to act. No showing has been made to justify this Court in reversing its long line of prior decisions holding against admiralty jurisdiction under facts substantially identical with those involved in the instant case.

For the reasons above set forth, we submit that the petition for writ of certiorari should be denied.

Dated at Portland, Oregon, this 28th day of August, 1944.

Respectfully submitted,

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